Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1511

CECIL ARCHER,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Air Line Pilots Association International through undersigned counsel respectfully prays that the Petition for a Writ of Certiorari be denied.

QUESTION PRESENTED

Whether a union's duty of fair representation should be expanded beyond matters within its exclusive agency so as to require pursuit of individual benefit claims addressed, not to the employer, but to third party insurance carriers which administer employee benefit plans.

STATEMENT OF THE CASE

Before this Court are Petitioner Cecil L. Archer, formerly an airline pilot with Braniff Airways, and

Respondent Air Line Pilots Association, International (hereinafter "ALPA"), the exclusive bargaining representative of Braniff pilots. At issue is whether ALPA's duty of fair representation obliged it to sue in pursuit of Archer's claim for insurance benefits against a carrier with whom Braniff contracted to provide employee insurance specified in its collective bargaining agreement with ALPA.

After becoming disabled in 1969, Archer was required to retire from employment with Braniff. He made an application for life and disability insurance benefits under an employee benefit plan established by Braniff in compliance with the Braniff-ALPA collective bargaining agreement. Braniff's carrier, Connecticut General, denied Archer's application in major part in March 1970. While the collective bargaining agreement allowed employees aggrieved by action of Braniff to file a grievance within 60 days, Archer did not file a grievance.[1] He did, however, bring the matter to the attention of the ALPA Master Executive Council for Braniff employees which referred the matter to the ALPA Legal Department in July 1970 for investigation (C.T. 122-124). After investigation, ALPA on July 30, 1971 furnished Archer with a memorandum stating its conclusions that the complaint could not be remedied under the grievance procedure because no employer violation was apparent; that the matter could be resolved only through litigation; and that—while Archer was free to bring suit himself—conduct of such litigation on his behalf by ALPA would violate ALPA's policy of conducting only litigation of general membership concern. (C.T. 202-205; a copy of the memorandum and ALPA's transmittal letter of July 30, 1971 are included as an Appendix to this Opposition). After pressing the matter for several additional months with ALPA (C.T. 127-133, 207-210), Archer retained private counsel in May 1972 and sued Braniff and Connecticut General for the disputed benefits. The matter was settled in April 1975 incident to which Archer was required to pay a 40% contingent fee of $30,913.45. Archer then brought suit against ALPA claiming his counsel fees as damages and asserting that ALPA's duty of fair representation obliged it to pursue his insurance claim whether through the contract grievance procedure or litigation.

ALPA accepts the statement of the procedural history of the litigation as set forth in the Petition (pp. 3-5) but does dispute the unsupported and misleading assertions in the statement of facts thereafter (pp. 5-9). First, since it is beyond dispute that Archer initiated no grievance against Braniff within 60 days after denial of his insurance claim his assertion that ALPA somehow thwarted exercise of the grievance process is plainly insupportable. Second, the collective bargaining agreement recognizes only grievances complaining of actions of the *employer*; neither the Petition nor Archer's comments

[1] The contract grievance procedure (C.T. 165) provides for initiation of grievances by the aggrieved pilot or pilots within 60 days of learning of the action complained of:

> Any *pilot, or group of pilots,* in the service of the Company who have a grievance concerning *any action of the Company affecting* them shall be entitled to the same right of investigation, hearing and appeal as is established in Section 36 hereof for the investigation and hearing of cases of discipline and dismissal.
>
> Such grievance shall specify the provision or the provisions of the contract which the Company is alleged to have violated and shall state the date and the place when such alleged violation supposedly occurred. Except for cases involving the disciplining or dismissal of an employee, to be effective *the grievance must be filed within sixty (60) days after the pilot, or group of pilots, reasonably would have knowledge of the action complained of.* The parties may mutually agree to extend such sixty (60) day limitation where the circumstances warrant. The written request for investigation and hearing as provided in Section 36, Paragraph A-3, of this Agreement shall be addressed to the Vice President Flight Operations, with a copy thereof to the pilot's immediate supervisor. (Emphasis added.)

on the ALPA memorandum (C.T. 207-209) dispute ALPA's conclusion that "there are no indications that Braniff has failed to comply with its obligations to make available long-term disability insurance coverage to pilots." (C.T. 204). Thus, there can be no serious dispute with ALPA's conclusion that Archer's complaint was at any rate not remediable through the grievance procedure.[2] Finally, Archer's references to "hollow promises from ALPA" (Petition, p. 8) and ALPA's assertedly "inept, inadequate, and perfunctory handling of his insurance grievances" (Petition, p. 7, n. 3), are without record support. While Archer is distraught that ALPA did not pursue his insurance claim to his satisfaction, he can point to nothing in the record showing that ALPA promised to do other than it did. ALPA's advice that Archer could individually pursue his claim through litigation was correct, was in line with ALPA's consistent policy, and came in ample time to allow him to sue without jeopardy of a limitations bar.

Since there is no serious issue but that Archer failed timely to invoke the contract grievance procedure and that his insurance complaint could not have been successfully remedied through that procedure at any rate,[3] the sole issue presented by this Petition is whether ALPA was obliged by its duty of fair representation to pursue Archer's insurance claim through litigation. Only if it was so obliged could it be held liable for Archer's fees in pursuit of that litigation. As set forth below, the Ninth Circuit's holding that ALPA "had no duty to

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[2] Indeed, ALPA's conclusion in this regard is substantially buttressed by the recent decision in *WJLA, Inc.* v. *Broadcast Employees*, 103 LRRM 2952 (D.D.C. February 12, 1980), holding that a claim for insurance against a carrier was not arbitrable under a collective bargaining agreement parallelling that here.

[3] Surely ALPA's duty of fair representation could not be violated by failure to pursue through the grievance procedure a complaint which was not arbitrable thereunder.

fairly represent Archer's grievance against Connecticut General" (Petition, A-9) is thoroughly consistent with the decisions of this Court and other Courts of Appeals. The Petition should accordingly be denied.

ARGUMENT

1. In upholding the District Court's rejection of Archer's duty of fair representation claim, the Court of Appeals correctly observed that the duty applies only to matters within the union's exclusive agency which did not include pursuit of Archer's insurance complaint against Connecticut General:

> "ALPA was not statutorily empowered to provide redress for Archer's grievance against Connecticut General. Nor did the ALPA-Braniff collective bargaining agreement provide that ALPA would be the employees' exclusive bargaining agent with Connecticut General. The bargaining agreement required Braniff to obtain insurance for its employees, but it neither set up procedures for making insurance claims nor made ALPA the exclusive vehicle for pursuing grievances. . . It is clear that ALPA had no duty to fairly represent Archer's grievance against Connecticut General.

Archer contends however, that 'assuming *arguendo* that ALPA owed no legal duty of fair representation to Archer vis-a-vis his insurance claims, it nonetheless, became subject to this fiduciary duty once it made representations, upon which appellant relied, that it would investigate his claim.' This estoppel argument is without merit. Even if Archer did rely upon ALPA to process his grievance, his reliance was unreasonable. Having served as one of ALPA's representatives during negotiation of the collective bargaining agreement with Braniff, Archer knew or should have known that he had no right to expect ALPA to handle his case in a particular man-

ner until he had filed a grievance in accordance with section 37 of the contract." (Petition, A-8-A-9)

The Ninth Circuit's understanding of the fair representation duty as extending only to matters within the union's exclusive agency is thoroughly consistent with the decisions of this Court—including the three cited by Petitioner. Petitioner quotes selectively in an effort to blur the boundaries of the duty. Thus, he quotes from this Court's decision in *International Bhd. of Electrical Workers* v. *Foust*, —— U.S. ——, 99 S.Ct. 2121, 2125 (1979) that the union "must represent fairly the interests of all bargaining-unit members during the negotiation, *administration* and *enforcement* of collective bargaining agreements" (emphasis added by Petitioner) (Petition, p. 9). He neglects to refer to the preceding sentence which makes clear that the duty applies to those negotiation, administration and enforcement functions *which are within the union's exclusive agency*: "when Congress *empowered unions to bargain exclusively* for all employees in a particular bargaining unit, . . . it imposed on unions a correlative duty . . . *to exercise that authority fairly.*" *Foust, supra, id.* (emphasis added). Similar qualification of the duty is reflected in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). *Hines* recognizes that the duty's scope is keyed to that of the union's exclusive authority by characterizing the bargaining agent's "responsibility" as "equal in scope to its authority. . . ." *Hines, supra,* 424 U.S. at 564.[4] Con-

[4] The Court proceeded to explain that claims for breach of the duty "may arise during the life of a contract when individual employees claim . . . improper treatment *at the hands of the employer.* Contractual remedies, at least in their final stages *controlled by union and employer,* are normally provided; *yet the union may refuse to utilize them or, if it does, assertedly may do so discriminatorily or in bad faith.*" *Hines, supra, id.* (emphasis added). Nothing in *Hines* suggests the duty would be breached by union failure to sue on a benefit claim against a carrier or other employee benefit plan. Maintenance of such a suit—unlike resort to the final stages of a contract grievance procedure for grievances against the employer—is not an exclusive prerogative of the union.

trary to Petitioner's intimation, *Conley* v. *Gibson*, 355 U.S. 41 (1957), does not support the proposition that once a benefit is negotiated, the bargaining agent is obliged to enforce it through suing on benefit claims against third party insurance carriers and employee benefit plans. *Conley* involved allegations by black plaintiffs that the union discriminatorily failed to pursue *against the employer* discharge grievances of black employees.[5] As the Court explained in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), but for the fair representation duty, the union's exclusive agency would create "unlimited discretion to deprive injured employees of all remedies for breach of contract", *Vaca, supra,* 386 U.S. at 186. Here, Archer's remedy against Braniff's carrier was in no way even qualified by ALPA's authority as bargaining agent.

The Ninth Circuit correctly held the fair representation duty to extend only to matters within the union's exclusive agency. It further correctly held that pursuit of individual benefit claims against a third party insurance carrier is not a matter within the union's exclusive agency. Petitioner's failure to cite a single case contrary to this holding is unsurprising inasmuch as litigation to enforce employee benefit claims payable by third parties to the bargaining agreement has routinely been

[5] Here, unlike *Conley*, there is no claim of discrimination in the provision of representation. ALPA has made a policy—as indicated in the appended memorandum—of pursuing litigation on behalf of individual members only where general membership interests are concerned. Archer accordingly can point to no instance in which ALPA has maintained suit on an individual benefit claim or reimbursed an employee for fees expended by him in such a suit. That it refused to do so even on behalf of Archer—a person long active in union affairs with whom persons in ALPA leadership were personally friendly (C.T. 172-174)—confirms the evenhanded application of ALPA's litigation policy. Thus, this case would fail to present a violation of the fair representation duty even were the duty extended as Archer requests.

maintained by individual claimants.[6] Notably, it has been held under the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*, that a union lacks standing to assert such claims, *Utility Workers Union* v. *Consumers Power Co.*, 453 F.Supp. 447, 450 (E.D. Mich. 1978).

Nor is the Ninth Circuit's holding in conflict with that of the Third Circuit in *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (C.A. 3, 1977), *cert. denied*, 434 U.S. 1013, the only case said to present a circuit conflict. As is apparent from Petitioner's recitation, *Nedd* did not hold a union obliged to sue to enforce benefit claims payable by third parties to the bargaining agreement. Rather, the claim in *Nedd* was that the union breached a duty of fair representation assertedly owed to retired pensioners through its alleged responsibility for the failure of the pension plan trustees to take sufficient steps to collect contributions owed by signatory employers under the collective bargaining agreement. The question of a union's duty to enforce obligations of third parties to the

[6] The duty of fair representation has been held inapplicable to denial of benefits by employee benefit plans regardless of their creation through collective bargaining, *Miniard* v. *Lewis*, 387 F.2d 864, 865 (C.A.D.C. 1967), *cert. denied*, 393 U.S. 873; see *Williams* v. *United Mine Workers of America*, 316 F.2d 475 (C.A. 4, 1963). This Court noted in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), that "the union's role in the administration" of a collectively-bargained benefit plan "is of a far different order from its duties as collective-bargaining agent" 404 U.S. at 170 and—citing *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201 (1962)—observed that the individual beneficiary would have a remedy for breach of contract were his benefits unilaterally changed or denied, 404 U.S. at 181, n. 20. In line with the Court's observation, suits for denial of benefits have been maintained routinely by the individuals aggrieved rather than by the unions which contracted for creation of the employee benefit plans; see for example, *Miniard, supra; Gaydosh* v. *Lewis*, 410 F.2d 262 (C.A.D.C. 1969); *Roark* v. *Lewis*, 401 F.2d 425 (C.A.D.C. 1968); *Connell* v. *U.S. Steel Corp.*, 516 F.2d 401 (C.A. 5, 1975); *Lee* v. *Nesbitt*, 453 F.2d 1309, 1311 (C.A. 9, 1972); *Lugo* v. *Employees Retirement Fund of the Illumination Products Industry*, 529 F.2d 251 (C.A. 2, 1976), *cert. denied*, 429 U.S. 826.

collective bargaining agreement under contracts ancillary thereto was in no way presented by *Nedd*. Contrary to Plaintiffs' assertion, the Third Circuit held only that the *Nedd* plaintiffs' claims were sufficient to support pendent jurisdiction and not that they made out a DFR claim, 556 F.2d at 200.[7]

2. Finally, to the extent employees should be allowed to recover fees expended in pursuant of individual benefit claims, Congress has addressed the matter explicitly in ERISA, 29 U.S.C. 1132(g), by authorizing fee awards on a discretionary basis in suits for employee plan benefits brought by plan participants and beneficiaries. Additionally, even prior to ERISA, fees were awardable in appropriate cases where benefits were withheld in bad faith, *Kiser* v. *Huge*, 517 F.2d 1237, 1256 (C.A.D.C. 1974); *Pete* v. *United Mine Workers of America Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1292 (C.A. D.C. 1975); *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). Thus, even in this pre-ERISA case, Archer could—if he wished—have pressed a fee claim against Connecticut General, which was after all the party which "forced [him] to hire a lawyer and go to court to get what was . . . owed him. . . ." *Vaughan, supra*, 369 U.S. at 531. Holding unions obliged to underwrite litigation of individual benefit claims would impose a legislative judgment which Congress has not made and which is in no way implicit in Congress' conferral upon unions of exclusive functions. Given the other avenues toward reimbursement of counsel fees in appropriate cases both under ERISA and otherwise, expansion of the fair representa-

[7] Even that holding of the *Nedd* Court would appear to conflict with this Court's declaration in *Pittsburgh Plate Glass Co., supra*, that since "retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." 404 U.S. at 181, n. 20.

tion duty beyond the traditional boundary—the union's exclusive agency—would be plainly inappropriate.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July 30, 1971

Mr. Cecil Archer
Box 304
930 Kenilworth Road
Kenwood, California 95452

Dear Cecil:

I apologize for the length of time it has taken to procure the attached memorandum concerning your insurance claim. The memorandum is self-explanatory.

In conversation with Allen Berk, the staff attorney here in Washington, he suggested one of two avenues, either the Braniff grievance machinery or outside legal assistance through the civil courts.

With regard to your cashing of the check which you are holding in your safety deposit box, he has no advice in that matter other than to put forth the idea that if you plan to pursue it through one of the aforementioned procedural steps, it would be better not to cash the check. However, if you feel that this memorandum would serve as a final thought, then, of course, you would be able to cash the check because you are in effect stopping your pursuit.

If I can be of further service, please contact me.

My regards to Carol.

Sincerely,

John P. Giberson, Secretary

Enclosure

JPG:es

cc: F. W. Stone
R. Drew
A. Berk

AIR LINE PILOTS ASSOCIATION
INTERNATIONAL

TO—John Giberson

FROM—R. Drew & A. Berk—/s/ R.H.D.

ATTENTION

SUBJECT—Cecil Archer's Insurance Claim

DATE—July 12, 1971

PLACE—Home Office

REFERENCE

At your request, the Retirement and Insurance Department has investigated the Archer insurance claim problem, and submitted the file to the Legal Department for review and handling. Both departments are in agreement as to what ALPA's response here should be, and we have prepared this memo to review our analysis.

The facts which give rise to Mr. Archer's claim are not in dispute. The file shows that Braniff and ALPA entered into an Agreement on March 13, 1969, in which the Company agreed to provide various forms of insurance coverage. Among the benefits negotiated was a provision which stated:

> "Effective April 1, 1969, the Company will make available to all pilots a Long-Term Disability Plan . . . Enrollment shall be entirely voluntary [and] cost of such plan shall be borne entirely by those participating. . ."

Thereafter, Braniff did secure a certificate of insurance from Connecticut General Life Insurance Company certifying the issuance of various policies for the benefit of pilot-employees. The certificate states that covered pilots will, in fact, be entitled to monthly payments upon proof of a long-term disability.

However, the certificate also states that, in order to be covered by Long-Term Disability Insurance, the employee must have been in "continuous active service during the 30-day period prior to enrollment; otherwise, coverage does not begin until after he completes 30 days of continuous active service. Furthermore, the certificate provides that the insurance company will require "evidence of his insurability" and may require the pilot-employee to provide evidence such insurability (i.e., physician's examination) at his own expense. The pilot-employee is also required to make appropriate contributions and to complete an "appropriate payroll deduction order" in order to secure coverage.

The above-described conditions and limits upon Long-Term Disability coverage are not inconsistent with the Braniff-ALPA Agreements or with the similar coverage provided pilots on other airlines, pursuant to other Agreements.

The file contains copies of two enrollment cards bearing Captain Archer's signature. One is dated March 30, 1969; it is marked to indicate a request for coverage on other forms of optional insurance but a rejection of Long-Term Disability coverage. The second enrollment cards bears a date of June 12, 1969 and is marked to indicate a request for all optional forms of coverage including Long-Term Disability. Although confirming documents on this point are not in the file, Captain Archer asserts that the Company did actually deduct the contribution ($6.81) for Long-Term Disability coverage for the May 15-May 31 period as if his first enrollment card had elected such coverage and contribution. This deduction has, subsequently, apparently been returned to Captain Archer and is regarded by Braniff as a payroll error.

Connecticut General has never requested Captain Archer to provide evidence of his insurability or notified him that his condition was acceptable for coverage.

Captain Archer's last working day was April 19, 1969. On April 20, 1969, he went on medical leave; on April 28, 1969, he underwent surgery; and he retired, effective August 1, 1969. The file contains a doctor's report dated November 1969, which asserts that Captain Archer suffers from an arterial insufficiency and is permanently unable to return to work. This report was furnished in response to Connecticut General's inquiry after Captain Archer submitted a Disability claim.

Connecticut General has paid Captain Archer the maximum benefits under the policy for short term disability, but has refused to honor his claim for Long-Term Disability. According to Connecticut General, there are two reasons for rejecting the latter claim:

1. Captain Archer did not complete 30 days of service prior to his execution of the June 12, 1969 enrollment card requesting coverage since his last working day was April 19, 1969.
2. Captain Archer had a past history of illness and, therefore, would have been required to submit to a physical examination and probably been rejected for coverage even if he had made a timely application.

Captain Archer asserts that he inadvertently wrote an incorrect date on the enrollment card requesting long-term coverage, and that this card was actually executed and delivered prior to that date. In a recent letter to you, Captain Archer indicates that he now recalls submitting this "mis-dated" enrollment card on April 3, 1969.

In our view, Captain Archer's claim does not present an appropriate situation for ALPA participation. With re-

gard to potential grievance action against Braniff, there are no indications that Braniff has failed to comply with its obligations to make available long-term disability insurance coverage to pilots. The fact that the insurance benefits actually provided contained certain limitations and conditions which operate to Captain Archer's exclusion does not suggest that Braniff violated its Agreement, since these limitations and conditions are routine and standard aspects of such insurance.

With respect to a potential suit against Connecticut General, such activities are not typically within the Association's range of services provided for individual members. Compare the Executive Board resolution of May 1970, which amended ALPA policy to allow a staff attorney to represent the pilot in a contested claim involving an ALPA-sponsored Loss of License policy. Moreover, even if ALPA policy were less clear regarding the prohibition against ALPA litigation on other forms of insurance claims, the facts of this case would militate against ALPA participation.

Thus, a lawsuit on Captain Archer's behalf would raise no issues of general concern to ALPA members, but would necessarily be focused instead upon detailed factual questions only: for example, when Captain Archer actually executed his enrollment card and what was the nature of his prior medical history. Without commenting upon Captain Archer's chances of success in these issues if he should decide to pursue a lawsuit against Connecticut General, it is clear that the issues to be litigated are of significance only to him, and cannot be deemed to involve any general ALPA interests.